No. 16035

In the United States Court of Appeals for the Ninth Circuit

RALPH C. GRANQUIST, District Director of Internal Revenue for the District of Oregon, APPELLANT

v.

MARGARET HACKLEMAN, APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Oregon

REPLY BRIEF FOR THE APPELLANT

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The brief heretofore submitted on behalf of the appellant anticipated generally the argument of the appellee in support of the District Court's judgment in this case. However, it is believed that some further discussion of the matter in the light of the brief filed on behalf of the appellee may be helpful to the Court in resolving the problem involved.

1. In the first place, it is to be noted that appellee's statement of the case (Br. 3-8) is an ex parte recitation of facts not shown by the record. The issue presented by this appeal is whether delinquency penalties imposed under Sections 291(a) of the 1939 Code

and 6651(a) of the 1954 Code for the late filing of income tax returns may be assessed and collected, as are the self-returned taxes reported on such returns, without the prior issuance of statutory deficiency notices.

Such delinquency penalties are imposed by those provisions "unless it is shown that such failure [to file within the time prescribed by law] is due to reasonable cause and not due to willful neglect," and appellee's ex parte statement of facts, whether true or not, appears to be an effort to demonstrate that appellee's failure to file timely returns for the years here involved was due to excusable neglect. However, this is not a proper proceeding for determination of the appellee's liability for the delinquency penalties, since the appellee has an adequate remedy at law by suit for refund for determination of this issue, and no such determination was requested by her complaint (R. 3-6) or amended complaint (R. 8-10). Accordingly, such ex parte statements may not be considered in determining the narrow issue presented by this appeal.

Moreover, we find it difficult to reconcile some of the ex parte statements with allegations in the complaints. For instance, it is alleged in the original complaint (R. 3-4) that on or about June 6, 1956, the defendant assessed an addition to tax of approximately $2,000 under Section 6651 of the 1954 Code, and demanded payment thereof within ten days (no demand being alleged in the amended complaint), while appellee's statement (Br. 6) tends to give the impression that the appellee first learned of the assess-

ment on September 16, 1956, when she "received a notice from the government which demanded that payment of the addition to the tax for the failure to file a timely return be made that day." The original complaint herein was filed September 17, 1956 (R. 6), yet the statement (Br. 6-8) pictures counsel for the appellee as making a feverish and exhaustive effort to obtain administrative review of the penalty assessments between the time such notice was received and the time the complaint was filed as a last resort to protect the rights of the appellee.

2. With respect to the issue here involved, it is first asserted (Br. 9) that the suit herein was brought by appellee "to enjoin the assessment of a tax and not to enjoin the assessment of a penalty." The semantics of the term "tax" is not helpful here. The amounts imposed by the statutory provisions here involved, and by other similar provisions, are not imposed as "taxes", but are imposed as civil sanctions, or ad valorem penalties, for failure to comply with certain specific requirements of the taxing statutes. See *Spies* v. *United States*, 317 U.S. 492, 495-497. They are so recognized by the taxing statutes themselves, and the assessment and collection provisions here involved, as well as the prohibitions against assessment and collection, and other provisions relating to similar statutory requirements, have sought to assimilate such civil sanctions, or ad valorem penalties, to the taxes with respect to which they are imposed for assessment and collection purposes. The basic fallacy of the appellee's argument is its failure to recognize this fact.

For instance, Section 291(a) of the 1939 Code provides that in the case of any failure to make a timely return, unless it is shown that such failure was due to reasonable cause and not due to willful neglect, "there shall be added to the tax," and the corresponding section (6651(a)) of the 1954 Code provides that "there shall be added to the amount required to be shown a stax on such return," the percentages therein specified. To assimilate these ad valorem penalties to the tax with respect to which they are imposed for assessment and collection purposes, Section 291(a), which applies only to returns of taxes imposed under Chapter 1 of the 1939 Code,[1] provides that the amount "so added to any tax shall be collected at the same time and in the same manner and as a part of the tax", unless the tax has been paid before discovery of the neglect, "in which case the amount so added shall be collected in the same manner as the tax"; while Section 6659 of the 1954 Code, which, as also does Section 6651(a), applies to a wide variety of taxes imposed under the latter Code.[2] After providing in subsection (a) thereof that the additions to tax, additional amounts, and penalties imposed under Chapter 68 "shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes", and that any reference in the 1954 Code to "tax" imposed by that Code "shall be deemed also to refer to the additions to the tax, additional amounts, and penalties" provided for by Chapter 68, Section 6659 fur-

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[1] See appellant's brief, p. 19, fn. 14.

[2] See appellant's brief, p. 20, fn. 15.

ther provides in subsection (b) with respect to assessment and collection of amounts added to the tax under Section 6651 (relating to delinquent returns, here involved) and Section 6653 (relating to failure to pay tax) "shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax (including the provisions of subchapter B of chapter 63, relating to deficiency procedures for income, estate, and gift taxes)." [3]

Since the appellee's right to injunctive relief in this case depends entirely upon whether the ad valorem penalties assessed against her under Sections 291(a) and 6651(a) for delinquent filing of income tax returns for 1953 and 1954, after taxes reported thereon had been paid, constitute deficiencies within the meaning of Sections 271(a) of the 1939 Code and 6211(a) of the 1954 Code, the essence of appellee's argument, as we see it, seems to be to construe the above provisions of Section 6659 of the 1954 Code as an extension, or qualification, of the statutory definition of "deficiency" to include ad valorem penalties imposed under Section 291(a) of the 1939 Code and Section 6651 of the 1954 Code—but as to the latter, only with respect to income taxes—as "tax imposed by this chapter" in the case of Section 271(a) of the 1939 Code and as "tax imposed by subtitles A or B" in the case of Section 6211 of the 1954 Code.

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[3] Similar provisions are contained in Section 6671 of the 1954 Code relating to assessable penalties imposed by Subchapter B of Chapter 68, except no reference is made to "deficiency procedures", which obviously would be unavailable in the case of penalties imposed under Subchapter B.

3. We submit there is no basis whatever for any such conclusion so far as the penalties for 1953 are concerned in view of the specific provision of Section 291(a) of the 1939 Code that if the tax has been paid before discovery of the neglect "the amount so added shall be collected in the same manner as the tax", which in this case was payable on notice and demand and could not have been made the basis of an effective deficiency notice. This is the precise issue decided in *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970, and there is no reported authority to the contrary other than the decision below.

With respect to the ad valorem penalties assessed against appellee for 1954 under Section 6651(a), we submit there is no sound basis in the statute or its legislative history for concluding that by the language used in Section 6659 Congress intended ad valorem penalties imposed by Section 6651(a) (with respect to income, estate, and gift taxes) as "taxes, imposed by subtitles A and B" in the computation of a deficiency under Section 6211 of the 1954 Code. Had it intended any such treatment of the delinquency penalties imposed by Section 6651(a), a part of "Subtitle F—Procedure and Administration," it could more logically done so by drafting Section 6211 to that end. However, that section was based upon Section 271(a) of the 1939 Code and "contains no material changes from existing law". H. Rep. No. 1337, 83d Cong., 2d Sess., p. A405 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4552); S. Rep. No. 1622,

83d Cong., 2d Sess., p. 573 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5222). Moreover, in reporting out the House Bill, the Committee on Ways and Means said of Section 6659 it provides that the additions to the tax, additional amounts, and penalties provided by Chapter 68 "shall be assessed, collected, and paid in the same manner as taxes, except where otherwise specifically provided in another section of this title",[4] and further, that "This conforms to the rules under existing law".[5] H. Rep. No. 1337, *supra*, p. A420. The section as reported out by the House Committee was not changed, and the same explanation of the section is contained in the report of the Committee on Finance of the Senate. S. Rep. No. 1622, *supra*, p. 595. This explanation does not indicate an intention that such penalties in the case of income, estate, and gift taxes should be treated as "taxes, imposed by subtitles A and B," within the meaning of Section 6211. Rather, the Committees further explained that "By virtue of this section, it is unnecessary in other parts of the title to specifically refer to these additions to the tax when providing rules as to collection, assessment, etc., of

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[4] There is no other section in the 1954 Code relating to the assessment and collection of delinquency penalties for the late filing of income tax returns.

[5] The report of the Committee on Ways and Means was submitted March 9, 1954. At that time the only "existing" decision law on the subject was *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970. *Newsom* v. *Commissioner*, 22 T.C. 225, affirmed, 219 F. 2d 444 (C.A. 5th), and the cases following it, relied upon by the appellee, all were decided later.

tion 59 of the 1939 Code installments of declared estimated tax, and (3) for substantial underestimates of estimated tax. The latter section makes no specific provision for the assessment and collection of penalties imposed thereby, such as those contained in Sections 291 and 293 of the 1939 Code and carried forward, in substance at least, in Section 6659 of the 1954 Code. This failure of Section 294(d) to make separate provision for the assessment and collection of penalties imposed by that section led the court to comment in *Davis* v. *Dudley*, *supra*, p. 428, that "The intended manner of collecting the penalties imposed by these subdivisions is thus left somewhat in doubt." Accordingly, based upon the specific language of the section that the penalties shall "be added to the tax", and the Tax Court's conclusion in *Newsom* v. *Commission*, *supra*, p. 227, that "it can thus be said to become a part of the tax", it followed the Tax Court in holding that such penalties constituted deficiencies within the meaning of the statute.

Muse v. *Enochs* (S.D. Miss.), decided August 26, 1958 (2 A.F.T.R. 2d 5617), also cited by appellee (Br. 26-27), which was decided after appellant's brief was written, involves the delinquency penalty imposed by Section 6654 of the 1954 Code (in lieu of sanctions previously imposed by Section 294(d) of the 1939 Code) for failure to pay estimated tax. It adds nothing to what was decided in *Newsom* v. *Commissioner*, *supra*, and *Davis* v. *Dudley*, *supra*, and like them, whether right or wrong, clearly is not authority for holding that the penalties here involved are "deficiencies" within the statutory definition.

Moreover, it is significant that Section 6654 is not mentioned in subsection (b) of Section 6659, upon which this appellee primarily relies.

While also not directly in point here, this Court's recent decision in *Hansen* v. *Commissioner*, 258 F. 2d 585, certiorari granted on first issue, November 10, 1958, decided since the appellant's brief in this case was written, as to the penalty issue there involved (pp. 589-591), clearly demonstrates that Congress has dealt separately with delinquency in the filing of declarations of estimated tax, both under the 1939 Code and under the 1954 Code, where the three penalties imposed by Section 294(d) of the former have been consolidated into one penalty imposed by Section 6654 of the 1954 Code. This further demonstrates the inapplicability to the present action of decisions involving delinquency penalties imposed by Section 294(d) of the 1939 Code.

McAllister v. *Dudley*, 148 F. Supp. 548 (W.D. Pa.), the other case cited for the first time by appellee (Br. 12, 18 fn. 15, 20 fn. 17, 28 fn. 19), clearly is not authority for the proposition that the penalties here involved constitute deficiencies within the meaning of the respective sttautes. That was an action to enjoin the collection of a 100% penalty assessed under Section 2707(a) of the 1939 Code for failure to pay income withholding and Federal Insurance Contribution Act taxes. The court there held injunctive relief was prohibited by Section 7421 of the 1954 Code since the penalty was to be assessed and collected in the same manner as taxes. To the extent that it is in any way applicable here, that decision supports the appellant's position in the instant case.